

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 25, 2005

LAWRENCE EARL RALPH v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Warren County
No. F-9614 Larry B. Stanley, Jr., Judge

No. M2005-01525-CCA-R3-PC - Filed November 29, 2005

The petitioner, Lawrence Earl Ralph, was convicted in the Warren County Circuit Court of possession of a Schedule VI controlled substance with intent to resell and received a two-year sentence. Subsequently, he filed a petition for post-conviction relief, claiming that he received the ineffective assistance of counsel and that his due process rights were violated when the trial court forced him to go to trial less than two weeks after he was reindicted for the offense. The post-conviction court denied relief. Upon review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

L. Scott Grissom, McMinnville, Tennessee, for the appellant, Lawrence Earl Ralph.

Paul G. Summers, Attorney General and Reporter; Leslie Price, Assistant Attorney General; Clement Dale Potter, District Attorney General; and Larry Bryant, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The facts of the case are scarce because the petitioner has failed to include the indictments, the judgment of conviction, or the trial transcript in the appellate record. However, according to the petitioner's post-conviction petition, on January 4, 2002, a police deputy stopped the petitioner's car for a registration violation. The deputy asked to see the petitioner's driver's license, and the petitioner gave his license to the officer. The petitioner told the officer that he had not had an opportunity to register the vehicle, and the petitioner was unable to show proof of ownership. During the stop, a K-9 officer arrived at the scene and walked his drug dog around the car. The dog

alerted to drugs in the car.

According to the petitioner's brief, the petitioner was arrested for possessing a Schedule VI controlled substance with intent to resell, driving left of the center line, and violating the registration law. On March 8, 2002, "Ralph Earl Lawrence" was indicted for possessing a Schedule VI controlled substance and reckless driving. On October 13, 2003, "[a] Capias/Bench Warrant was served on the Appellant . . . as a result of an apparent re-indictment" that had been issued on October 3, 2003. The petitioner claims that he was arraigned on the new indictment on October 13, 2003, went to trial on October 16, 2003, and was convicted of possessing a Schedule VI controlled substance with intent to resell, a Class E felony.

The petitioner did not file a motion for new trial or appeal his conviction.¹ Subsequently, he filed a petition for post-conviction relief, claiming that he received the ineffective assistance of trial counsel. The post-conviction court appointed counsel, and counsel amended the petition. In the amended petition, the petitioner also claimed that his due process rights were violated because he was forced to go to trial less than two weeks after he was reindicted for the offense in violation of Tennessee Code Annotated section 40-14-105.²

At the evidentiary hearing, the petitioner's trial attorney testified that a few days before the petitioner's trial, the petitioner came to his office and hired him. The petitioner had fired his previous attorney. Counsel knew that the petitioner was going to trial in a few days, and counsel felt that he had time to prepare for trial properly. The petitioner's former attorney had filed a motion to suppress the drugs found in the petitioner's car, and counsel argued the motion on the day that the petitioner was scheduled to go to trial. That same day, counsel filed a second motion to suppress, arguing that the petitioner had been unlawfully detained during the traffic stop and that the drug dog was unreliable. The trial court overruled the motions and granted a three-day continuance for trial.

At trial, counsel had a "very well developed theory of defense," claiming that the petitioner had been test-driving the car and had been unaware that drugs were present. Counsel stated that during the trial, the defense stipulated that the substance found in the car was marijuana. He said that he did not discuss the stipulation with the petitioner and that the stipulation was a tactical decision to prevent a Tennessee Bureau of Investigation agent from testifying. He stated that the State called two deputies to testify, and he could not remember if he interviewed them. He stated that he had been aware of the facts and circumstances surrounding the case and that he was surprised the petitioner was convicted. He stated that he asked the petitioner to give him the name of the person who owned the car, but the petitioner refused. Counsel did not seek a plea agreement with the State, and the State did not make any plea offers.

¹The petitioner's attorney specifically stated at the post-conviction hearing that the petitioner was not seeking a delayed appeal.

²Tennessee Code Annotated section 40-14-105 provides that "[e]very person accused of any crime or misdemeanor whatsoever shall be entitled to fourteen (14) full days, Sundays and legal holidays excluded, after arrest and the return of the indictment or presentment before being tried for such offense."

Counsel testified that the petitioner's original indictment had charged him with simple possession and had listed his name as "Ralph Lawrence." At some point before trial, the petitioner was reindicted for felony possession with intent to resell, and his name was corrected on the new indictment. Counsel did not go over the indictments with the petitioner. He stated that he did not attend the petitioner's sentencing hearing because the petitioner fired him after the trial. He said that he thought the petitioner had other counsel and that he did not file a motion to withdraw from the petitioner's case.

In denying the petition for post-conviction relief, the post-conviction court concluded that the petitioner's trial attorney did a "good job." The post-conviction court noted that the attorney filed a second motion to suppress and "tried to do everything he could." The court held that the petitioner failed to show that his trial attorney rendered deficient performance or that he was prejudiced by any deficiency. Regarding the fact that he was reindicted less than two weeks before trial, the trial court ruled that the petitioner's attorney had been aware of the felony drug charge against the petitioner and that everyone involved in the case "knew what the charge was."

II. Analysis

The petitioner claims that he received the ineffective assistance of trial counsel. In support of his argument, he notes that he was reindicted for the offense in question on October 3, 2003, arraigned and arrested for the offense on October 13, 2003, and went to trial on October 16, 2003. He contends that pursuant to Tennessee Code Annotated section 40-14-105, he was entitled to a minimum of fourteen days between his reindictment and the trial and that "[i]f the trial attorney had been cognitive of the situation, he could have avoided going to trial on a case in which he had no defense prepared." The petitioner also claims that the trial court's forcing him to go to trial soon after his reindictment and arraignment violated his right to due process. The State claims that the appellant has waived the issues because he failed to provide an adequate record for review, failed to cite the appropriate references in the record, and failed to cite to authorities in his brief. In the alternative, the State contends that the trial court properly concluded that the petitioner did not receive the ineffective assistance of counsel and that his due process rights were not violated. We agree with the State that the petitioner's brief does not comply with Tennessee Rule of Appellate Procedure 27(a)(7) and that he failed to provide an adequate record for our review. In any event, we conclude that the post-conviction court properly denied post-conviction relief.

To be successful in his claim for post-conviction relief, the petitioner must prove all factual allegations contained in his post-conviction petition by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f). "Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.2 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). Therefore, we afford the post-conviction court's findings of fact the weight

of a jury verdict, with such findings being conclusive on appeal absent a showing that the evidence in the record preponderates against those findings. Id. at 578.

A claim of ineffective assistance of counsel is a mixed question of law and fact. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). We will review the post-conviction court's findings of fact de novo with a presumption that those findings are correct. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). However, we will review the post-conviction court's conclusions of law purely de novo. Id. "To establish ineffective assistance of counsel, the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). In evaluating whether the petitioner has met this burden, this court must determine whether counsel's performance was within the range of competence required of attorneys in criminal cases. See Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

The petitioner has failed to include the indictments, the judgment of conviction, or the trial transcript in the appellate record. It is the petitioner's duty on appeal to prepare an adequate record in order to allow a meaningful review. See Tenn. R. App. P. 24. Without the trial transcript, we are limited in our evaluation of trial counsel's performance. Nevertheless, we note that the post-conviction court concluded that trial counsel did a "good job" representing the petitioner and that the petitioner did not receive the ineffective assistance of counsel. Based upon the limited record before us, we agree with the post-conviction court. Counsel testified that although he was hired by the petitioner only three days before trial, he understood the felony charge against the petitioner and believed he could prepare an adequate defense. The attorney also testified that the defense's theory of the case was that the petitioner was test-driving the car and that the petitioner did not know drugs were in the car. In light of this testimony, we cannot say that the evidence preponderates against the post-conviction court's finding that the petitioner received the effective assistance of trial counsel.

Regarding the petitioner's claim that his being forced to go to trial soon after his reindictment and arraignment violated his right to due process, this issue has been waived. See Tenn. R. App. P. 27(a)(7) (providing that the appellant's argument must cite to authorities and appropriate references in the record); Tenn. Ct. Crim. App. R. 10(b) (providing that issues not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived). In any event, the trial court concluded that the parties involved in the case had been well-aware of the felony charge against the appellant. In light of the record before us, we cannot conclude that the post-conviction court was in error.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the post-conviction court.

NORMA McGEE OGLE, JUDGE